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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNIVERSAL CITY STUDIOS, INC.,

Plaintiff-Appellant

against

84-7095

NINTENDO CO. LTD. and NINTENDO OF AMERICA, INC.,

Defendants-Appellees.

New York, N. Y.
May 23, 1984
11:45 a.m.

Before:

HON. THOMAS J. MESKILL,
HON. AMALYA L. KEARSE,
HON. HENRY J. FRIENDLY,

Circuit Judges.

APPEARANCES:

TOWNLEY & UPDIKE
Attorneys for Plaintiff-Appellant
BY: DOUGLAS C. FAIRHURST

MUDGE ROSE GUTHRIE ALEXANDER & FERDON
Attorneys for Defendants-Appellees
BY: JOHN J. KIRBY, JR.

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the immediate association with King Kong. That is the secondary meaning.

JUDGE MESKILL: But they didn't use the King Kong name. You said embodying the King Kong name.

MR. FAIRHURST: Embodying Kong from the King Kong name, and in conjunction with the use of a gorilla, a fair maiden, standing on top of a building, which is what the Donkey Kong does, your Honor.

I have here an exhibit that was used below, and I will hold it up for the Court to see. This is the defendant's game, an advertisement for it, not the playing surface of the game, not the mode you would see when you play it, but an advertisement for it. Donkey Kong. And you can see the gorilla, the fair maiden, on top of the building.

I would next hold up a product that is licensed by Universal to a company called Tiger, and it is a video -- this is not the video game -- this is the cassette game, the cover of it, for the King Kong product that Universal distributes. And this is used on a tabletop game and --

JUDGE MESKILL: When did that come out?

MR. FAIRHURST: This came on the market approximately two months after Nintendo's product but

Finally, there has been Universal's own continuous use of the King Kong name as a trademark, in conjunction with the licensing of the product to which I have just referred -- this (indicating) in conjunction with Universal's own plans which are in development and have been now for approximately two years --

JUDGE MESKILL: For what purpose did they use it from the time of the assignment until they came out with the King Kong game?

MR. FAIRHURST: Universal first licensed anyone to use King Kong in 1980, at the expiration --

JUDGE MESKILL: What was date of the assignment, again?

MR. FAIRHURST: The assignment that Universal took would be December 15, 1976, and that is in the record. It is an agreement between Mr. Cooper, to whom a court had awarded the King Kong rights by virtue of litigation in 1975, which I will turn to in a moment, and -- I am sorry, the assignment was December 15. And at that point there were then outstanding approximately thirty merchandising licenses that RKO had already licensed through Dino De Laurentiis and through Paramount Pictures. When those licenses

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